IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 29

WILLIAM B. CAMMARANO and LOUISE CAMMARANO,
His Wife, *Petitioners*,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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The alternative holding of the court below was that petitioners had failed to prove that passage of the initiative measure here in question would have destroyed their business (R. 138-139). The Government no longer makes any effort to support that holding. Accordingly, as the case is now postured, it is plain that passage of the initiative would have put these tax-

payers out of business. Yet the Government's arguments reflect a studied refusal even to recognize the existence of that consequence, which is the central fact in the present case. Petitioners' reply is accordingly far more lengthy than it would have been had the Government fairly faced the basic issued presented.

1. The Government's Contention That the Expenditures Incurred by Petitioners in Opposing the Initiative Measure in Question Are Not Deductible as "Ordinary and Necessary" Business Expenses Utterly Ignores the Controlling Fact—Now No Longer Disputed—That Passage of That Initiative Measure Would Have Destroyed Petitioners' Business.

A. The Government's brief is completely and unwarrantably silent regarding the effect of the initiative measure that petitioners opposed.

1. The basic issue in this case, as presented in the petition for certiorari (Question 1, Pet. 2) and as repeated in petitioners' brief-in-chief (Question 1, Pet. Br. 2), is whether the expenditures made by petitioners to defeat an initiative measure that would have destroyed their business may be disallowed by the taxing authorities in the face of Sec. 23(a)(1)(A), I.R.C. 1939 (Pet. Br. 67; U. S. Br. 55) which permits deductions of "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business."

Petitioners' Point IA (Pet. Br. 15-20) was that "Sums spent in an endeavor to protect a taxpayer's business from destruction are deductible as ordinary and necessary business expenses." Many cases were cited, and *Commissioner* v. *Heininger*, 320 U. S. 467, was heavily relied on, there and throughout petitioners' argument. Despite all this, it will still be well nigh impossible for one not yet acquainted with the case, who

at the outset reads only the Government's brief, to learn that the initiative measure which petitioners spent money to oppose had any effect on their business, much less that it would have destroyed that business.

2. The question as posed by the Government (U. S. Br. 2) is:

> "Whether taxpayers' payments to organizations established to finance publicity campaigns aimed at defeating proposed initiative legislation in the States of Washington and Arkansas[1] are deductible as 'ordinary and necessary' business expenses under Section 23(a)(1)(A) of the Internal Revenue Code of 1939."

That formulation, very plainly, does not correctly or truly present the question; instead, it only begs that question.

A similar avoidance of the issue infects the opening sentence of the Government's statement (U. S. Br. 3):

> "These cases involve the question of deductibility, as 'ordinary and necessary' business expenses, of sums paid by the respective taxpayers to organizations established to finance publicity programs designed to defeat initiative proposals in the States of Washington and Arkansas."

We submit that it would be difficult, either as an original proposition or otherwise, to fashion language better calculated to conceal from the reader the primary issue that is to be decided by this Court.

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[1] The case of *F. Strauss & Son, Inc.* v. *Commissioner of Internal Revenue*, No. 50, this Term, involves an Arkansas corporation, engaged in the wholesale liquor business, that made expenditures to oppose an Arkansas initiative petition which called for a statewide prohibition act.

3. The leading case permitting the deduction as "ordinary and necessary" business expenses of sums paid by a taxpayer to preserve an existing business from destruction, *Commissioner* v. *Heininger*, 320 U. S. 467, which petitioners discussed at length and cited throughout their brief, is neither stated nor discussed by the Government, and is only incidentally cited in the Government's brief—twice as a "compare" and once as a "see also" (U. S. Br. 18, 24, 26).

Had *Heininger* never been decided, the Government's position here would be substantially stronger. Similarly, if petitioners' expenditures here had been aimed at an initiative measure other than one which would have destroyed their business, the Government's position here would likewise be stronger.

As matters stand, however, the Government ignores both the controlling fact and the controlling decision involving that fact. The result is that, by comparison with the Government's brief in this case, the previous extreme example of distorting expurgation—Hamlet without the Prince of Denmark—stands as an instance of stark, uncompromising realism.

Petitioners would, we submit, be fully justified in complaining that parties to litigation should not be required to assume the burden of filing a reply brief to correct a distortion as gross as the one that permeates the Government's brief. For present purposes, however, it is sufficient to point out that the Government's failure to face the real issue emphasizes the weakness of its position and the lack of foundation for its arguments.

B. The Government no longer attempts to support the alternative holding of the court below that petitioners had failed to establish that the initiative measure would have destroyed their business.

The court of appeals found alternative support for its denial of petitioners' deduction in its holding (R. 138-139) that petitioners failed to establish that passage of the initiative would have impaired their business.

This holding was assigned as error here (Question 3, Pet. 2; Question 3, Pet. Br. 2), it was argued by both sides when the case was pending on petition for certiorari (Pet. 14-15; Br. Op. 10-11), and it was extensively argued by petitioners in their brief on the merits (Pet. Br. 59-65).

Petitioners' position was that, of course, a measure that closes all retail stores save only the State's necessarily destroys all wholesalers' business, and that any other view is demonstrably untenable.

The Government apparently agrees, for it has abandoned its prior support of the alternative holding (Br. Op. 10-11), and now makes no attempt whatever to sustain that holding. Even the fact that there was an alternative holding is relegated to a footnote (U. S. Br. 5, note 2).

Thus both parties are now agreed that the initiative measure, if passed, would have destroyed petitioners' business. In view of that agreement, there is accordingly even less excuse for the Government to avoid and ignore, in a case involving business expenses, the business effect of the threat at which the expenditures were directed.

C. Whatever the merits of the alleged policy against "public subvention" of activities designed to influence legislation as an argument in vacuo, it is inapplicable to such activities when directed towards preventing the destruction of an existing business.

The Government argues at great length (U. S. Br. 27-37) that the Treasury regulation relied on by the courts below to deny petitioners their deduction "is in accord with the long-established Congressional policy against 'public subvention' of political pressure activities to influence legislation." Here also, the Government's arguments proceed without any regard to the fact that the "legislation" involved in the present case would have destroyed the business of those taxpayers.

Petitioners do not quarrel with the view that, if they had been individuals whose business had not stood to be affected by the passage of the initiative measure in question, they would not have been permitted a deduction in respect to the expenditures now in issue. In that event, those expenditures would not have been among "the ordinary and necessary business expenses paid or incurred during the taxable year in carrying on [their] business." Sec. 23 (a)(1)(A), I.R.C. 1939 (Pet. Br. 67). Indeed, in that event those expenditures would not have been business expenses in any sense.

Nor do these petitioners quarrel with the view that if, not being in the business of beer wholesaling, they had made expenditures in an effort to defeat Initiative Measure No. 13, they would not have been able to deduct those payments as contributions within Sec. 23(o), I.R.C. 1939 (U. S. Br. 55); the terms of the statute, which specifically deny a deduction for contributions to organizations "no substantial part of the

activities of which is * * * attempting, to influence legislation," as well as the terms of Treas. Reg. 111, Sec. 29.23(o)-1 (Pet. Br. 67-69), which repeat the statutory language, forbid. But no such language appears in the business expense section, and the regulation here relied upon by the Government is indexed under and thus tied to the contribution section of the Code.

A taxpayer seeking a deduction as a contribution need not be in business to avail himself of the provisions of Sec. 23(o). That section has nothing whatever to do with business expenses. The deductibility of business expenses, allowed by Section 23(a), turns on the activity of the taxpayer making the payment, whereas the deductibility of contributions, permitted by Section 23(o), depends on the activity of the recipient of the payment and not in any sense on the activity of the taxpayer making the payment. The latter factor is significant only in respect of Section 23(a) deductions. But the specific statutory and regulatory language invoked by the Government—"Sums of money expended for * * * the promotion or defeat of legislation"—appears neither in the business expense section nor in any regulations associated with that section.

We submit that the plain and indeed inescapable inference from the difference in statutory language is that Congress did not intend the clause with which it limited permissible contributions to apply to business expenditures that were in other respects "ordinary and necessary." Here, since the "legislation" in question would have destroyed petitioners' business, their expenditures aimed at preventing such destruction were deductible as a matter of law under the rule of *Commissioner* v. *Heininger*, 320 U. S. 467—a decision whose impact the Government apparently hopes somehow to avoid by according it silent treatment.

Petitioners do not think it necessary to repeat what is already set forth at pp. 54-56 of their brief-in-chief. It is sufficient simply to add that there is no warrant either in the language of the Code or in its legislative history for writing into the business expense provision, Sec. 23(a), any of the substantive limitations on deductible contributions that are found in Sec. 23(o), any more than there is for limiting the percentage of deductible business expenses that will be allowed under Sec. 23(a) by the percentage limitation on contributions that appears in Sec. 23(o).[2]

The Government's "public subvention" argument is climaxed by the following paragraph (U. S. Br. 36):

> "Suppose, for example, that a citizens' organization had been established in the State of Washington for the purpose of financing a campaign *supporting* the initiative proposal involved in No. 29 to limit the sale of wine and beer to state-owned stores. Contributions to that organization would not be deductible. But, under taxpayers' construction, the liquor industry could deduct without limit their payments to organizations *opposing* the same measure." [Italics in original.]

The answer of course is that the members of a citizens' association supporting the initiative proposal could not for a moment claim that such support constituted an expense necessary or even incidental to their normal business. Similarly, no citizens' association,

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[2] Sec. 23(o) provides, in its last paragraph, that deductions are allowed for contributions only in "an amount which in all the above cases combined does not exceed 20 per centum of the taxpayer's adjusted gross income." There are similar percentage limitations in Sec. 23(p)(1)(A) and in Sec. 23(a)(1)(B), but none in the basic business expense provision here involved, which is Sec. 23(a)(1)(A).

as such, opposing the proposal, could show any business connection in their opposition. Individuals who might oppose the initiative because they wanted to continue to frequent taverns, or because as devotees of free enterprise they disliked the extension of State entry into an additional retail business, or because they objected on principle to any further restrictions on beverage transactions, would likewise be unable to bring their contributions within Sec. 23(a)(1)(A), since, obviously, their opposition would have no business flavor.

Only beer and wine retailers and wholesalers could qualify under the cited section, since only those groups could show an impending destruction of their several businesses. (The Government is in error, incidentally, in speaking (U. S. Br. 36) of "the liquor industry"; there is none in Washington; the State conducts all alcoholic beverage transactions except in wine and beer. See Washington State Liquor Act, c. 62, Laws of 1933, Extra. Sess., now Wash. Rev. Code, Title 66, Alcoholic Beverage Control; see Chapter 66.16, State Liquor Stores).

It is therefore arguing wide of the mark to invoke "a tax equilibrium" (U. S. Br. 36), to seek to compare large and small businesses (U. S. Br. 36-37), or to attempt to set business against labor is still another context (U. S. Br. 36). The only persons or corporations which are free to claim their contributions against this particular initiative as business expenditures are those whose business would have been affected thereby. That would include petitioners, individual taxpayers engaged in beer wholesaling; it would include corporate taxpayers so engaged; it would include any individual or corporation engaged in beer retailing;

and, necessarily, it would include any individuals employed by the foregoing, since such individuals would stand to lose their jobs if the measure were adopted.

Otherwise stated, those whose business or livelihood would be destroyed by the initiative measure may deduct as ordinary and necessary business expenses any sum expended by them to defeat the measure and thus to prevent such destruction. Those whose business or livelihood would not be similarly affected may not take such deductions, and it is entirely irrelevant to any issue in this case to set forth what the consequences of allowing the deductions to this large and non-eligible group might be. Yet the Government's arguments are addressed to the non-eligibles, and studiously avoid the situation of the small eligible group in which petitioners here are included.

The short of the matter is that the Government's arguments are directed to a state of facts that is not presented by this case, and that those arguments ignore the only factual situation which is presented.

The passage of an electric current through a vacuum results in oscillations that have brought us the X-ray, the radio, and television. But the passage of a legal argument through a vacuum produces only unhelpful obfuscation.

II. The Textile Mills Case Involved Lobbying, and Applies Only to Lobbying.

Humpty-Dumpty said, "When *I* use a word, it means just what I choose it to mean—neither more nor less." Consideration of the Government's reading of *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326, strongly suggests that it cites that case throughout in the Humpty-Dumpty manner.

The Government says (U. S. Br. 22), summarizing an extended argument, "Viewing *Textile Mills* in its true light, it becomes apparent that the decision involved no activities which might be characterized as 'lobbying' in the sense of direct dealings with legislators." If that were so, it is indeed difficult to understand the *Textile Mills* opinion.

Here is an excerpt from the Board of Tax Appeals' opinion (32 B.T.A. at 625):

> "F. W. Mondell, an attorney and a former member of Congress, was employed in connection with the preparation and making of proposals and suggestions to members of Congress, 'the aim of which was to promote the speedy passage of the desired legislation.' "[3]

Moreover, this Court dealt with the case on the footing that lobbying in the sense of solicitation of individual legislators was involved. E.g., (314 U.S. at 338), "Contracts to spread such insidious influences through legislative halls have long been condemned." That passage simply does not make sense if, as the Government urges (U. S. Br. 22), *Textile Mills* "involved no activities which might be characterized as 'lobbying' in the sense of direct dealings with legislators." Moreover, if *Textile Mills* had been thus limited, then the Court's citations, of *Trist* v. *Child*, 21 Wall. 441, and *Hazelton* v. *Sheckels*, 202 U. S. 71, immediately after the sentence just quoted from its opin-

[3] The same passage appeared in virtually the same words in the opinion of the Third Circuit (117 F. 2d at 63):

> "Mr. Mondell, who is an attorney and a former member of Congress, was employed by the taxpayer to make proposals and suggestions to members of Congress to promote the speedy passage of the desired legislation."

ion, would have been wholly inapposite. Those were lobbying cases, and they were cited because, very plainly, this Court considered that *Textile Mills* involved lobbying.

Nor is the Government on sounder ground when it argues (U. S. Br. 23-24) that "The *Textile Mills* decision was not based on the illegality of any contract," quoting from the opinion the sentence (314 U. S. at 338-339) reading "Whether the precise arrangement here in question would violate the rule of those cases is not material."

In one of the cases cited, *Hazelton* v. *Sheckels*, 202 U. S. 71, 79, the Court had said:

> "* * * whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations and it intensified the inducement by the contingency of the reward."

But the full opinion in *Textile Mills*, taken in the setting of what this Court held in cases involving legislative activity but not lobbying, shows that *Textile Mills* necessarily turned on the line between legality and illegality. This Court said (314 U. S. at 339):

> "There is no reason why, in absence of clear Congressional action to the contrary, the rule-making authority cannot employ that general policy [i.e.,

of *Trist* v. *Child* and *Hazelton* v. *Sheckels, supra* in drawing a line between legitimate business expenses and those arising from that family of contracts to which the law has given no sanction."

If that sentence does not plainly convey the view that the line turns on the legality of the contract in question, then the English language has suddenly become defective as a medium of communication. There can be no mystery about what was intended. The holding is that the regulation may properly define the statutory phrase "ordinary and necessary" in terms of what is legal. Lobbying is illegal, or at least so violative of public policy as to make contracts for lobbying unenforceable (*Marshall* v. *Baltimore & O. R. Co.*, 16 How. 314; *Trist* v. *Child*, 21 Wall. 441; *Hazelton* v. *Sheckels*, 202 U. S. 71), and therefore a regulation denying deductions for expenditures involving lobbying may be supported.

On the other hand, contracts providing for legitimate legislative activity are enforceable, even when contingent in nature (*Trist* v. *Child*, 21 Wall. 441, 450; *Spalding* v. *Mason*, 161 U. S. 375; *Nutt* v. *Knut*, 200 U. S. 12; *McGowan* v. *Parrish*, 237 U. S. 385; *Winton* v. *Amos*, 255 U. S. 373; *Steele* v. *Drummond*, 275 U. S. 199), and therefore a regulation purporting to declare that expenditures under contracts for legitimate legislative activity which in every other respects qualify as ordinary and necessary business expenses are to be denied deductibility, is purely arbitrary. Such a regulation is as invalid as the one considered in *Bingham's Trust* v. *Commissioner*, 325 U. S. 365, that attempted to deny deduction for a particular class of expenses otherwise within the language of the statute.

Comparison of two cases decided at the same Term—*Nutt* v. *Knut*, 200 U. S. 12, with *Hazelton* v. *Sheckels*, 202 U. S. 71—shows that when there is no lobbying the contract is enforceable even though contingent, whereas where solicitation of legislators is involved, the very tendency is sufficient to condemn the arrangement. Significantly enough, only the latter case was cited and relied upon in *Textile Mills*.

The nub of the matter is, not only that *Textile Mills* fairly read necessarily turns on the illegality of what was there involved, but that there is no automatic illegality for any and all activity connected with legislation. The vice of the Government's argument is that it attempts to attribute illegality to every dealing with legislation. There is simply no support in the authorities for any such view. See, e.g., *Steele* v. *Drummond*, 275 U. S. 199, 203. Accordingly, a regulation which attempts, either in text or in context, to disallow what would otherwise be ordinary and necessary business expenses simply because they involved legislative activity is invalid because in conflict with the statute. A close parallel is *Bingham's Trust* v. *Commissioner*, 325 U. S. 365, where this Court held invalid a regulation that attempted to deny deduction for "Expenses incurred * * * for the purpose of resisting a proposed additional assessment of taxes" in the face of a statute permitting deduction of "ordinary and necessary expenses paid or incurred for the * * * conservation or maintenance of property held for the production of income." For where expenditures are as clearly ordinary and necessary as in *Heininger*—which was cited in *Bingham's Trust*, 325 U. S. at 376—then the latter case teaches that not even an express barrier erected by the Treasury by way of regulation can impair or

diminish the Congressionally granted deduction of such expenditures.

It was purely arbitrary in *Bingham's Trust* to exclude expenses of resisting an additional tax assessment from the ordinary and necessary non-business expenses that Congress had declared to be deductible; it is equally arbitrary to exclude the expenses of opposing legislation that would have destroyed the taxpayer's business from the ordinary and necessary business expenses declared deductible here by the statute as interpreted in *Heininger.*

We do not for a moment contend, as the Government seems to think (U. S. Br. 49), that the words "the promotion or defeat of legislation" in the regulation are surplusage. Our position is that that portion of the regulation is invalid. Our position is that when expenditures are "ordinary" because incurred to save an existing business from destruction, and "necessary" because made under arrangements that by an unbroken line of decisions are legal, enforceable, and not in contravention of any public policy, a regulation which attempts to carve out of the statute a particular class of expenditures meeting both those requirements is arbitrary, unreasonable, in conflict with the basic statute, and hence invalid.

In sum, we submit that when *Textile Mills* is read in context, it is shown not only to involve lobbying, but also shown not to extend beyond lobbying. The carefully chosen language in which that decision is couched would otherwise be, if not meaningless, at least obviously inappropriate.

We are aware that *Textile Mills* has on occasion been more broadly construed by the lower courts. See, e.g.,

U. S. Br. 24-25. Many of the cases there cited are plainly distinguishable on their facts. But, to the extent that they are not, they can hardly be regarded as even persuasive here as to just what this Court held. Significantly enough, as we have heretofore pointed out (Pet. Br. 34-35), this Court has always cited *Textile Mills* as a lobbying case. See *Lilly* v. *Commissioner,* 343 U. S. 90, 95; *Commissioner* v. *Heininger,* 320 U. S. 467, 473.

III. In Any Event, the Government's Effort to Equate an Initiative Measure With the "Legislation" Dealt With in the Regulation Ignores the Substance of the Struggle Over the Initiative, and Would Moreover Raise a Serious Constitutional Question.

Alternatively, even if the regulation here in question had validity as applied to what is "legislation" in the usual sense of a law passed by a legislative body, it cannot be applied to an initiative measure, which is legislation enacted by the people; and any attempt to do so would raise a serious constitutional issue.

A. The distinction between legislation by a legislature and legislation by the people is the basic one which underlay the struggle for the adoption of the initiative, and cannot be verbalized or trivialized away as the Government seeks to do.

Under the present heading, the Government abandons the technique of Humpty-Dumpty in favor of the logical processes of the late Gertrude Stein; its position (U. S. Br. 42-46) is that "legislation is legislation is legislation," and that there is accordingly no difference between legislation enacted by a legislature and legislation enacted by the people under initiative provisions. The latter, says the Government (U. S. Br. 43), "is plainly an exercise of legislative power and the

product cannot be considered as anything other than legislation," citing six state cases.

Those decisions are not very helpful in the present connection. One of them (*Opinion of the Justices,* 118 Me. 544, 107 Atl. 705) holds that the joint resolution of the Maine Legislature which ratified the Eighteenth Amendment to the Federal Constitution did not need to be submitted to the people under the initiative and referendum provisions of the Maine Constitution—a result that would follow in any event from Article V of the Federal Constitution. Another (*Dawson* v. *Tobin,* 74 N. D. 713, 24 N. W. 2d 737) dealt not with the initiative but with the effect of a referendum: Where a repealing act passed by the legislature is submitted to the people on referendum and is there defeated, does such defeat revive the repealed act in the face of a statutory provision that the repeal of a repealer does not operate as a revivor? It is hardly necessary to argue at length the unhelpfulness of the answer to that question in any present connection.

The other four cases (*Wallace* v. *Zinman,* 200 Cal. 585, 254 Pac. 946; *Commonwealth* v. *Higgins,* 277 Mass. 191, 178 N.E. 536; *Kadderly* v. *Portland,* 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; *Senior Citizens League* v. *Department of Social Security,* 38 Wash. 2d 142, 228 P. 2d 478) all hold that initiative measures are subject to constitutional limitations. Any other view, of course, would open the door to intolerable popular tyranny. But the decisions go on diverse grounds. In Massachusetts the initiative provision, Article 48 of the Amendments to its Constitution, specifically provides that "The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder."

In California, the court held that the constitutional provision requiring all legislative bills to have their subject-matter expressed in their titles operated to render void a portion of an initiative measure not so expressed (*Wallace* v. *Zinman,* 200 Cal. 585, 254 Pac. 946, *supra*), while in Washington the holding was that a similar constitutional provision was applicable only to the titles of legislative bills and not to the ballot titles of initiative measures. Indeed, the Supreme Court of Washington pointed out that "No act passed by the people of this state has ever been declared unconstitutional because of a defective legislative title." *Senior Citizens League* v. *Department of Social Security,* 38 Wash. 2d 142, 173, 228 P. 2d 478, 495.

In Washington, where the present case arose, there is accordingly a recognized constitutional difference between legislation passed by a legislature and an initiative measure passed by the people. But petitioners are not content to rest their case on that distinction. What is involved here is a difference far more basic, a difference in political structure, a difference that goes to the heart of government itself. The generation-long battle over the adoption of the initiative was fought out over that difference in more than half of the states of the Union.

Essentially, the struggle for the adoption of the initiative and the referendum, like the substantially contemporaneous struggle for the direct election of United States Senators that terminated in the ratification of the Seventeenth Amendment, reflected a deep-seated distrust of state legislators, and a belief in the superior virtues and lesser fallibility of the voters at large. Could the people safely trust their representa-

tives? Or must they in the last analysis rely upon themselves?

A competent critic phrased the matter thus (W. B. Munro, *Initiative & Referendum,* 8 Encyc. Soc. Sci. 50, 51):

> "The chief reason for the spread of direct legislation in the United States is to be found in the impatience of the people with the work of their state legislatures. By reason of the lack of authoritative leadership, the persistent lobbying on the part of special interests and the intermittent control of legislative bodies by political bosses a great deal of dissatisfaction with the work of these legislatures developed during the closing years of the nineteenth century. People came to the conclusion that by their own direct action they could hardly do worse and might do better. Consequently they took into their own hands the power to make and to reject laws—not as a procedure for everyday use, but merely as a method to be used when the desired results could not be had in any other way."

The contest came to a head in 1912-1913. In 1912, the Seventeenth Amendment was proposed by Congress to the States, and many, many States amended their constitutions by adopting provisions for initiative and referendum. In the following year the Seventeeth Amendment's ratification put an end to the election of Senators by state legislatures, as Art. I, Sec. 3, had provided since the beginning.

These far-reaching changes in political structure constituted the people's answer: They would trust their legislators only to a point. Consequently, to urge, as the Government does, that a law passed by the people is in every sense the same as a law passed by the legis-

lature, is to trivialize into nothingness the subject-matter of a struggle that engaged state and national leaders over many years, and that succeeded in moving the center of power gravity in the governments of more than half of the States. To say that this was not a far-reaching change would be as unsound as to argue that the Seventeenth Amendment really amounted to very little because the individuals elected to office thereunder by popular vote are still United States Senators, just as much as those elected by state legislators were prior to 1913.

This very shift in gravity emphasizes what Theodore Roosevelt said in 1912 about the "prime duty of the people to free our Government from the control of money in politics" (Pet. Br. 40, note 14). The Government (U. S. Br. 46) urges that, if this was one of the objectives of the initiative, it has not been accomplished in the present case, pointing out that the Washington Beer Wholesalers' Association, Inc. expended $231,257.10 for the program that assisted in defeating Initiative No. 13 (R. 46).

The Government's argument, far from minimizing the effect of initiative procedures, demonstrates the tremendous effect that those procedures have had.

In 1947, when the measure now in question was submitted to the Washington Legislature without action thereon (Fdg. 7, R. 45-46), that Legislature had 46 members in the Senate and 99 members in the House of Representatives—145 legislators in all. See Wash. Rev. Code, §§ 44.08.020, 44.12.020. Under pre-initiative conditions, the expenditure of close to a quarter of a million dollars might well have an appreciable effect on any legislation pending in the legislature, either on

that body generally, or on the cognizant committees, or on the chairmen of the committees. The contemporary pro-initiative literature is replete with references to "the legislative blackmailer." See Sen. Bourne of Oregon, quoted at Pet. Br. 40, note 13; see also other references cited Pet. Br. 40-41.

After ratification of the initiative amendment to the Washington Constitution (Pet. Br. 69-70), however, the situation became vastly different. Adoption or rejection of Initiative No. 13 involved winning the support of over half of the entire electorate of the State; and in 1948, the year in which that measure was defeated, there were some 905,000 voters who participated.[4] With that number of voters, \$231,000 came to about $25\frac{1}{2}$ cents per voter—and all of that sum was spent in trying to reach the voters' minds with arguments against the initiative that were disseminated in various forms of advertising by radio, mail, billboards, and the like (R. 115-116).

Thus the objective of the proponents of the initiative was attained. A sum which, on the lowest and most cynical level might suffice to influence key members of the legislature—or even the entire legislature—was plainly inadequate to corrupt the entire people. What Theodore Roosevelt was concerned about (Pet. Br. 40, note 14), "the control of money in politics," had become so diluted through the operation of the initiative that it had ceased to control.

Nor was there the slightest taint of illegality or impropriety in petitioners' appeal to the public. The district court specifically found that all they did was

[4] This was a Presidential year, in which 905,059 voters cast their ballots. *World Almanac* (1958) 609.

proper (R. 29; Fdg. 11, R. 47). Their appeal was not in any sense within what this Court in *Textile Mills,* 314 U. S. at 338, condemned as an effort "to spread * * * insidious influences through legislative halls." And legitimate activity to influence legislation pending ature before the voters as distinguished from legislation pending before the [redacted] has never been deemed illegal. See *Restatement of the Law of Contracts,* § 559, quoted at Pet. Br. 49. What was here involved was an effort "to saturate the thinking of the community," which, as this Court has twice held, is not lobbying. *United States* v. *Rumely,* 345 U. S. 41; *United States* v. *Harriss,* 347 U. S. 612.

At this juncture, the Government asserts (U. S. Br. 50-51) that in the present case the people of the State of Washington were "the legislators themselves." This is truly Gertrude Stein with a vengeance; this contention verbalizes into nothingness a fundamental distinction, and in effect blots out some thirty years of history.

The essence of the battle for the initiative was that there was a difference between the individual voter and the individual legislator. The essence of the *Rumely* and *Harriss* cases is that there is a difference between an attempt "to saturate the thinking of the community" and an attempt to saturate simply the thinking of the members of the legislature, a difference so vast as to be of constitutional proportions.

Indeed, it was the circumstance that a constitutional amendment did not involve action by the legislature which saved the expenditure in *Luther Ely Smith,* 3 T. C. 696, from what would otherwise have been the condemnation of the regulation here in question. And that decision, *non constat* the Government's assertion

(U. S. Br. 25, note 7; 44, note 19) has never been overruled.

McClintock-Trunkey Co., 19 T. C. 297, reversed on other grounds, 217 F. 2d 329 (C. A. 9), one of the cases on which the Government now relies (U. S. Br. 25, note 7; 44, note 19), can scarcely qualify as an overruling decision. In its opinion there (19 T. C. at 304), the Tax Court not only did not cite *Luther Ely Smith*, it did not even discuss any distinction between an initiative measure and a constitutional amendment, and certainly the Commissioner of Internal Revenue did not at that juncture withdraw his previous acquiescence (1944 Cum. Bull. 26) in *Luther Ely Smith*.

Nor does the memorandum opinion in *Mosby Hotel Co.*, decided October 22, 1954 (U. S. Br. 25, note 7; 44, note 19) amount to an overruling, as the Government hopefully asserts (*ibid.*). For one thing, the Tax Court's memorandum opinions are not regarded as precedents and hence are not officially reported.[5] More-

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[5] See the authoritative article by Judge Murdock of the Tax Court, *What Has the Tax Court of the United States Been Doing?* 31 A.B.A.J. 297, 298-299:

"* * * Memorandum Opinions are not published in printed form or included in the bound volumes of the reports of the court. The Presiding Judge also decides whether an opinion is or is not to be printed. The Memorandum Opinions, that is, the ones that are not printed, are supposed to be limited to those having no value as a precedent. They include any case decided solely upon the authority of another, cases covering subjects already well-covered by opinions appearing in the bound volumes of the reports, failure of proof cases, and some others. Doubts as to whether a case should be in memorandum form or printed are resolved in favor of printing. If counsel finds in a Memorandum Opinion some precedent of value, he may cite it effectively in his brief, even though it does not appear in the bound volumes of the reports of the court."

over, the Commissioner did not consider the *Mosby Hotel* case a precedent when it appeared for, here again, his published acquiescence in *Luther Ely Smith* was not withdrawn for three and half years after that memorandum appeared unofficially. That withdrawal, as we have hitherto pointed out (Pet. Br. 47-49), was triggered only by the grant of certiorari in the present case.

We have already pointed out why, the legislature not participating, there is no sound distinction in the present connection between in initiative measure and a constitutional amendment. Pet. Br. 47-49. The Government asserts the contrary (U. S. Br. 25, note 7)—but by assertion only. Just how the Government squares that position with the Commissioner's newly-fashioned declaration (Pet. Br. 48) that there is no real difference between the two is not for us to say.

We submit that, on the basis of the contemporaneous materials on the initiative, any attempt to equate an initiative measure with a bill pending in a legislature ignores history, ignores the obvious facts of political structure, and does violence to the general understanding of what is meant by "legislation."

B. The Government's effort to apply the regulation to activities that are directed against initiative measures that would destroy a taxpayer's business raises a serious constitutional question.

Petitioners urged, citing *Speiser* v. *Randall*, 357 U. S. 513, 518, that to construe the Treasury regulation here involved so as to deny them a business deduction would raise a serious constitutional question under the First Amendment (Pet. Br. 42-44). That contention was not, as the Government seems to think

(U. S. Br. 38, note 13), as effort to raise a new issue on appeal; rather, it is an attempt to avoid raising such an issue, which, under the *Speiser* case—decided after certiorari was granted herein—would assuredly be involved if the Government's position were supported.[6]

Here again, the Government's arguments are not addressed to the facts of the present case. It is not necessary to disagree with the Government's general proposition (U. S. Br. 37-42) that "The First Amendment is not violated by the Congressional policy against 'public subvention' of political pressure activities to influence legislation." For what is involved here, as we have repeatedly said in the face of the Government's studied refusal to recognize the fact, is an initiative measure that would have destroyed petitioner's business.

Consequently petitioners were not seeking to defeat just any initiative measure, they were acting to defeat an initiative measure that would have put them out of business, they were endeavoring to protect their existing business from destruction. It follows that their appeals to the public at large to defeat this initiative measure must be compared with their appeals to the public at large in the course of any other effort to protect and preserve the same business.

Petitioners' appeal to the public to use their products—ordinary trade advertising—would, plainly enough, be an effort to continue in business, and would in consequence qualify as "ordinary and neces-

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[6] The circumstance that (U. S. Br. 38) it does not "appear that the issue was raised in any other case in the 40-year history of the regulation" prior to the decision in *Speiser* v. *Randall*, 357 U.S. 513, is of course irrelevant.

sary" business expenditures, regardless of how the psychologists or the public relations experts or the students of mass communications might analyze that effort, or what labels or slogans they would apply thereto. Here petitioners appealed to the public to reject an initiative measure under the terms of which their business would have been destroyed. On what basis, therefore, can it be contended that the cost of the first method of attempting to continue in business may be deducted, but that the cost of the second may not?

We submit that *Speiser* v. *Randall,* 357 U. S. 513, 518, bars any such contention: "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. * * * To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech."

Here petitioners are sought to be penalized for addressing communications to the people, not in terms asking the public to continue to buy petitioners' products, but asking the public to vote down a measure which would forbid petitioners to sell those products.

Both sets of communications have the same business objective. Indeed, it is entirely accurate to say that any attempt to distinguish the two forms of speech rests on one of two premises, both of which are equally untenable.

One is that there is something reprehensible about legislative activities even when they do not involve actual lobbying; that premise, as we have already pointed out at length (Pet. Br. 26-38; *supra,* pp. 14-16), lacks reasonable basis, runs counter to the statute, and has only the foundation of arbitrary fiat.

The other possible premise is that to permit petitioners to deduct the sums expended by them in the effort to defeat an initiative measure which plainly would have destroyed their business would involve "'public subvention' of political pressure activities to influence legislation" (U. S. Br. 27). The short answer is that allowing the deduction here no more amounts to subsidizing efforts to influence legislation generally than allowing the deduction in *Commissioner* v. *Heininger,* 320 U. S. 467, amounted to subsidizing mail frauds.

In each instance, the controlling fact was that the taxpayer stood to lose his business. We submit that nothing in the Internal Revenue Code operates to impair a taxpayer's right of self-defense. Compare *Bingham's Trust* v. *Commissioner,* 325 U. S. 365, discussed at Pet. Br. 37-38.

IV. The Reenactment Doctrine Does Not Serve to Sustain the Regulation in Its Application to the Facts of the Present Case.

Petitioners have already (Pet. Br. 51-59) fully discussed the infirmities of the reenactment doctrine as sought to be invoked here by the Government, and need add only a few words.

First. When that doctrine is tested by the necessary qualification that the same situation must be involved (*United States* v. *Missouri P. R. Co.,* 278 U. S. 269, 279-280), then, plainly, there has been no reenactment; since, in the sole instance prior to the enactment of the Internal Revenue Code of 1939 where a taxpayer spent money to avoid legislation that would have put him out

of business, he was allowed a deduction for those expenditures. *Lucas* v. *Wofford*, 49 F. 2d 1027 (C.A. 5).[7]

Second. The Government traces the present regulation in a long footnote (U. S. Br. 29-31, note 10), and says (U. S. Br. 20, note 5) that "reissuance of an identical regulation can hardly destroy the effect of its long history." But where the Government relies, as it does here (U. S. Br. 25-27), on reenactment, it must show a course of dealing and a succession of regulations that are apparent and ascertainable. It is not sufficient to point to a regulation that has gone underground, to reappear in an unlikely location. For the basis of the reenactment doctrine, like that of the rule which attaches great weight to administrative construction, is notoriety; Congress is assumed to have had knowledge of a practice long continued and widely known. See *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472-473. In reenacting a statute, Congress may well be considered to have had in mind readily available textual history, but it can hardly be charged with having approved whatever may have been revealed by textual archeology. And the fact of the matter is that in the more than forty years since the first appearance of the regulation stating that expenditures for the promotion or defeat of legislation were not deductible, the Commissioner related that prohibition to business ex-

[7] In that case, the taxpayer sold a motor fuel the sale of which would have been prohibited by the terms of a bill introduced in the state legislature. He retained an attorney who presented an exempting amendment, and the latter appeared before the governor, the attorney general, and various committees of the legislature to urge its adoption. No lobbying was involved. The amendment was adopted. The court held that the attorney's fees were an ordinary and necessary business expense, and affirmed a decision of the Board of Tax Appeals in the taxpayer's favor.

penses only in a single year; during all the rest of the time he included it under donations, contributions, and gifts.[5]

[5] To avoid any misleading impression that might be created by footnote 10 of the Government's brief (U. S. Br. 29-31), the following should be kept in mind:

When first issued, the regulation pertaining to corporations was captioned "Lobbying Expenses" (T.D. 2137, 17 Treas. Dec. 48, 57-58 (1915); Art. 143, Regs. 33 (1918 ed.)). On only one occasion, namely, in the aforementioned Article 143 of Regs. 33, did the corporate regulation ever state that expenditures for the promotion or defeat of legislation were not deductible as "ordinary and necessary" business expenses of a corporation—and that provision (Art. 143 of Regs. 33) was in effect for a single year: 1918.

Commencing with Art. 562, Regs. 45 (1919 ed.), and throughout all successive corporate regulations, the regulation in question omitted any reference to deductibility as an "ordinary and necessary" business expense in denying the deduction of expenditures for the promotion or defeat of legislation. See Art. 562 of Regs. 45 (1920 ed.), 62, 65, and 69, promulgated under the Revenue Acts of 1918, 1921, 1924 and 1926, respectively; Art. 262 of Regs. 74 and 77, promulgated under the Revenue Acts of 1928 and 1932 respectively; Art. 23(o)-2 of Regs. 86 promulgated under the Revenue Act of 1934; Art. 23(q)-1 of Regs. 94, promulgated under the Revenue Act of 1936; Arts. 23(o)-1 and 23(q)-1 of Regs. 101, promulgated under the Revenue Act of 1938; and Sections 19.23(o)-1 and 19.23(q)-1 of Regs. 103; 29.23(o)-1 and 29.23(q)-1 of Regs. 111; and 39.23(o)-1 and 39.23(q)-1 of Regs. 118, all promulgated under the Internal Revenue Code of 1939.

Of equal significance with such express omission are the facts that (a), commencing with said Art. 562 of Regs. 45 (1919 ed.), the corporate regulation was successively captioned "Donations", "Donations by corporations" and "Contributions or gifts by corporations"; and (b), commencing with the initial indexing of the corporate regulation under a Code section in Art. 262 of Regs. 74, promulgated under Revenue Act of 1928, this regulation was indexed under sections of the Code entitled "Charitable and Other

Consequently, unless the doctrine of reenactment is now to become not only a fiction but a particularly abhorrent fiction, it is plain that the Congress in reenacting Section 23(a) did not enact as a part thereof a regulation that the Commissioner for over more than thirty years had keyed to Section 23(o).

Third. In *Luther Ely Smith,* 3 T. C. 696, the Tax Court held the regulation inapplicable to a measure that was legislative in character but did not require action by a legislature. The Commissioner acquiesced in that decision for some fourteen years. Under *Helvering* v. *Winmill,* 305 U. S. 79, 83, a reenactment case specifically rested on "regulations and interpretations long continued without substantial change", which is here relied on by both sides (Pet. Br. 58, U. S. Br. 25), it is plain that, if the reenactment doctrine has any weight in the present situation, it is decisive for petitioners.

Very plainly, the United States may not simultaneously blow hot and cold. It may not urge reenactment on the basis of a long course of consistent dealing and at the same time rely on the Commissioner's withdrawal of his fourteen-year-long *Luther Ely Smith* acquiescence, just after certiorari had been granted in the present case. Reenactment cannot be predicated upon such a *post motam litem* flip-flop.

Contributions" and was not indexed under the business expense Code sections.

No provision dealing with the deduction of expenditures for the promotion or defeat of legislation was inserted in the regulations dealing with individuals until 1938; see Pet. Br. 56. Here again no reference was made to deductibility as an "ordinary and necessary" business expense, the regulation was captioned "Contributions or gifts by individuals", and it was likewise indexed under a section of the Code entitled "Charitable and Other Contributions".

V. The Government's Newly Fashioned Attack on Petitioners' Activities as "Propaganda" is at Variance With the District Court's Specific Findings That Such Activities Were Proper, Lacks Support in the Record, and Constitutes an Unwarranted Assault Upon Freedom of Speech.

The Government now argues that petitioners' efforts to defeat Initiative No. 13—which would have destroyed their business—constituted "the exploitation of propaganda" within the terms of the regulation (U. S. Br. 47-48), and that moreover petitioners' activities could not qualify as "open, honest non-lobbying efforts" (U. S. Br. 51-53). The Government asserts that what petitioners did constituted "propaganda", essentially (U. S. Br. 47-48) because it was "a concerted attempt to influence public opinion by colored facts from concealed sources."

These contentions were not made below. The advertisements on which the Government now relies (R. 151-158, cited at U. S. Br. 47, 52) were not a part of the printed record when the case was before the Ninth Circuit, and were not before this Court even in unprinted form while the case was pending on petition for certiorari. The Clerk's files show that this material was neither filed here nor designated for inclusion until after certiorari was granted. The present arguments are accordingly afterthoughts—and, as will be seen, they have the usual infirmities of such productions.

A. The Government's present characterization of petitioners' efforts as improper are contradicted by the district court's specific findings.

The Government's newly-fashioned characterization of petitioners' activities run afoul of the district court's opinion and findings, both of which emphasized the propriety of what petitioners did.

In his oral opinion, the district judge said (R. 29):

> "* * * This is not to indicate that there is anything evil or corrupt about spending money for these purposes. Quite the contrary. The expenditure of money to enlighten and inform the public with respect of initiative measures is a perfectly proper and laudable activity. When the general public are called upon to enact or refuse to enact legislation, the more information they are given and the more widespread it is distributed the better. Certainly neither this taxpayer nor the Washington Brewers Institute nor the brewing industry are in any manner to be criticized for having spent the money to defeat the legislation by fair publicity. They had a right to do that and propriety of expenditures therefore is not in question. * * *"

Later he specifically found (Fdg. 11, R. 47):

> "* * * There was nothing wrong or evil or corrupt about spending money for this purpose. Expenditures to enlighten and inform the public with respect to initiative measures are perfectly proper and laudable."

In the face of these findings, the Government's belatedly conceived attack on the propriety of petitioners' action (U. S. Br. 47-48, 51-53) necessarily fails.

B. The record does not support the Government's assertion that petitioners' efforts were untrue or secret.

It is argued (U. S. Br. 52-53) that the presentation of the arguments against Initiative No. 13 was neither open nor honest, because, so it is said, "nowhere does it appear that the campaign was sponsored by beer and wine wholesalers or retailers or any others who had

a financial interest in the legislative result" (U. S. Br. 52).

The facts are quite to the contrary. The record specifically shows (a) that the published arguments against Initiative No. 13 made it perfectly plain that the beer industry and its employees had a deep concern over and a direct interest in the measure; (b) that the beer wholesalers did not single-handedly sponsor the campaign against the measure; and (c) that neither the question of sponsorship nor the question of what groups also contributed was litigated at the trial.

1. Under the Washington statutes cited by the Government (U. S. Br. 46, note 20), arguments for and against Initiative No. 13 were circulated at public expense. Those arguments are in the record (R. 96-101). The Argument against Initiative No. 13 said in part (R. 101):

> "These are the most serious effects of Initiative 13—but there are also others. The beer and wine industry provides jobs directly for 14,000 persons in the state—jobs with an annual payroll of $35,000,000. It pays taxes of nearly 22 million dollars a year. It is a Washington business buying more than $52,000,000 a year in Washington products."

Plainly, therefore, every voter in the State was specifically advised of the obvious fact that Initiative No. 13 would have affected adversely not only the beer and wine industry but its employees—all of whom in consequence had "a financial interest in the legislative result" (U. S. Br. 52). We cannot forbear to express surprise at the invidious terms in which the Government thus characterizes the situation of the many in-

dividuals who would have joined the ranks of the unemployed had the people adopted Initiative No. 13.

2. The record refutes the Government's present contention that the beer wholesalers alone sponsored the campaign against Initiative No. 13, and that any advertising not so stating was in consequence untrue.

Adwen, Secretary of the Beer Wholesalers, testified (R. 77):

> "A. In 1948, Mr. Kehoe, we became aware that this would put our people out of business. I say 'our' again bearing in mind at least 90 per cent, and that it was necessary for the organization along with other organizations affected to protect themselves by raising certain amounts of money to see that we were taken care of by probably some advertising concern. * * *"

At R. 85:

> "A. This, sir, was the fund that was set up in which the wineries, beer wholesalers and tavern operators set up called the Industry Advisory fund. That was the fund to which Washington Beer Wholesalers contributed at various times whenever it was necessary to keep, get a little more money in the bank."

Also contributing to the fund was the Washington Brewers Institute (R. 111-116), an organization vitally concerned (R. 112), although not threatened with being put out of business, since its members' product would be bought by state retail stores.

The extent to which the Beer Wholesalers and the Brewers contributed to the campaign by comparison with other organizations who likewise opposed Initiative No. 13 does not appear, this matter not having

been litigated at the trial nor considered in any of the pretrial proceedings (R. 20-26).

3. Nor is there any evidence in the record tending to show that the organizations sponsoring the advertising to which petitioners contributed were misnamed. The exact composition of "Men and Women Against Prohibition" (R. 152, 153, 155, 157, 159, 161-164) and "Citizens Liquor Control Council, Inc." (R. 168, 182), is not shown, but if, as seems likely, it included, besides the business men who would have lost their jobs through the operation of Initiative No. 13, those large groups of citizens who, (a) liked to frequent taverns, (b) resented anything that even smacked of further liquor restrictions, and/or (c) believed in free enterprise and therefore wanted to keep the State of Washington out of any additional retail businesses, then the titles used were an accurate collective characterization of the two organizations. No doubt, if the Government at or before the trial had considered the make-up of either group material to any issue in the case, the matter could easily have been explored then.

C. The Government's labeling of petitioners' activities as "propaganda" adds nothing except an epithet.

The Treasury regulation in question speaks of "the exploitation of propaganda" (Pet. Br. 68), while the statute to which that regulation relates (Sec. 23(o), I.R.C. 1939; U. S. Br. 55) mentions "carrying on propaganda". In this Court the Government invokes the regulatory phrase (U. S. Br. 47-48).

It would appear that the Government characterizes the advertisements to which petitioners contributed as "propaganda" because, in the Government's view, the arguments made were extreme, non-objective, and "dis-

closed a selfish or ulterior motive" (U. S. Br. 48). Apparently in the Government's view, it is selfish and ulterior for petitioners to attempt to protect a lawful business from destruction; it is similarly selfish and ulterior for the employees concerned to wish to protect their jobs; and it is not objective to portray the initiative as leading to the return of the speakeasy, bootleggers, gangsters, and racketeers (U. S. Br. 47).

The Government does not attack the motives of the proponents of Initiative No. 13. These individuals, who stood to lose neither their business nor their livelihood, were presumably—in the Government's view—unselfish, and acted from the highest of motives. The Government's objectivity in the matter is perhaps best demonstrated by the circumstance that it does not adversely characterize the published arguments of the measure's proponents, arguments that included the following (R. 96, 98):

> "Unquestionably Taverns Are a Menace. They are the breeding places for immorality, crime and youth delinquency. Read the stories (of tavern-centered tragedy) in your own newspapers. Quarrels—fights—broken homes—unattended children—drunken men, women, juveniles—drunken driving. The taverns of today are far worse than the old time saloons ever were."
>
> * * * *
>
> "A Day of Decision Is at Hand. The Taverns Have Sinned Away Their Day of Grace. No Longer Will the Voters of the State of Washington Tolerate These Establishments Which Disgrace Men, Women and Children, and Undermine and Sabotage the Welfare of the People of This State."

On their face, the arguments in favor of the measure would appear to warrant some of the characterizations the Government applies to the arguments in opposition (U. S. Br. 47-48)—although we do not understand that the right to make a contention has hitherto depended in any degree on the merits of that contention.

The short of the matter is that any argument can always be characterized as "propaganda" by those on the other side, so that, in actual fact, the word "propaganda" has become an epithet. It adds nothing to the discussion, and as sought to be applied to what would otherwise be business expenses is either void for vagueness or else runs afoul of the First Amendment.

For at what stage does business advertising become "propaganda"? Consider the advertising slogans that have passed into the language: "Ask the man who owns one"; "I'd walk a mile for a Camel'; "His master's voice"; "You just know she wears them"; "LS/MFT"; and a host of other examples which will readily occur to the reader. Who will separate those familiar catchwords into advertising and propaganda? And if they are so separated, so that expenses for one are deductible while those for the other are not, then, plainly, the resultant differentiation runs afoul of *Speiser* v. *Randall*, 357 U. S. 513, 518.

The regulation as it now stands (Pet. Br. 68) denies deductions for "Sums of money expended for * * * the exploitation of propaganda, including advertising other than trade advertising * * *"

There can be no quarrel with the denial of a deduction for "advertising other than trade advertising," since that category has no business purpose and thus sums expended therefor are neither ordinary nor neces-

sary within the statute. Here, however, the advertising had a business purpose under the rule of *Commissioner* v. *Heininger,* 320 U. S. 467, because its objective was to prevent destruction of the business. That being so, the deduction cannot be disallowed by any attempt to stigmatize that advertising as "propaganda."

The only valid test, we submit, is the relationship of the communication to the income-producing enterprise. If it qualifies in other respects as a business expense, then it does not lose its deductible status because someone else may seek to characterize it, on one basis or another, as "propaganda." Here again, the Government's difficulties are of its own making; its consistent refusal (*supra,* pp. 2-10) to consider the business effect of the initiative measure that petitioners opposed necessarily leads it, here also, to talk of "propaganda" and to ignore that what this case involved was business propaganda with a business purpose and hence just as legitimate—and equally as deductible—as any trade advertising.

For the rest, it is sufficient to note that perhaps the only realistic definition of "propaganda" is its cynical characterization as "the other fellow's arguments."

D. Finally, the Government's present position constitutes an unwarranted attack on freedom of speech.

What is so disturbing about the Government's approach in this case is that to avoid paying out a few tax dollars—$153.98 in this case (R. 10, 15, 21)—it makes a serious, unwarranted, and unjustified attack on petitioners' right to appeal to their fellow-citizens not to be put out of business, and hence on freedom of speech itself.

The Government begins by invoking previous investigations of lobbying (U. S. Br. 32-35), and from there it moves to attack "political pressure activities to influence legislation" (U. S. Br. 37-42). Then, after arguing that there is no difference between opposing legislation pending before a legislature and an initiative measure pending before the people at large (U. S. Br. 42-46), the Government characterizes as "propaganda" the campaign to which petitioners contributed (U. S. Br. 47-48), and finally urges—without record support and indeed in the very teeth of the record; *supra*, pp. 32-35—that the campaign was neither open nor honest (U. S. Br. 51-53).

The totality of the argument, aimed at taxpayers who addressed appeals to their fellow citizens to reject an initiative measure that would have destroyed their business, constitutes as dangerous an assault as has been made in some time upon freedom of speech and upon the very essence of the democratic process.

This Court has twice in recent years distinguished between lobbying—the personal solicitation of individual legislators—and the attempt, here involved, "to saturate the thinking of the community." *United States* v. *Rumely*, 345 U.S. 41; *United States* v. *Harriss*, 347 U. S. 612. Even so, this Court was divided, in these cases as well as in *United States* v. *Automobile Workers*, 352 U. S. 567, as to the precise limitation placed by the First Amendment on the Congressional power to protect federal elections and its own legislative processes. But here, where the Government verbalizes the people of the entire State into "the legislators themselves" (U. S. Br. 50-51), there can be no doubt that a regulation which, by discriminatory denial of a tax deduction allows businessmen to com-

municate to the public on every subject pertaining to their business except in respect of an initiative measure which would destroy that business, plainly contravenes the First Amendment. *Speiser* v. *Randall*, 357 U. S. 513. Therefore, just as in the *Rumely* and *Harriss* cases, this Court should construe the Treasury regulation here involved so as to avoid a constitutional question.

CONCLUSION

For the foregoing additional reasons, the judgment below should be reversed, with directions to enter judgment for the petitioners in the amount prayed for.

Respectfully submitted.

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